Supreme Court, U.S.
FILED
APR 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1211

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMANDA REID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 922(a)(6), which prohibits the making of a false statement of material fact in connection with the purchase of a firearm, is unconstitutional as applied to petitioner.

2. Whether evidence seized in a search of premises in New York should have been suppressed in petitioner's trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	11
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463 (1976) 15
Franks v. *Delaware*, 438 U.S. 154 (1978) 9, 14
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) 12
Huddleston v. *United States*, 415 U.S. 814 (1974) 2, 11
Lewis v. *United States*, 445 U.S. 55 (1980) 12
Standard Drywall, Inc. v. *United States*, 668 F.2d 156 (2d Cir.), cert. denied, 456 U.S. 927 (1982) 7
United States v. *Behenna*, 552 F.2d 573 (4th Cir. 1977) ... 13, 14
United States v. *Leon*, 468 U.S. 897 (1984) 15
United States v. *Miller*, 307 U.S. 174 (1939) 12

Constitution, statutes and rule:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 11
Art. VI, Cl. 2 (Supremacy Clause) 13
Amend. II 12
Amend. X 12
18 U.S.C. 922(a)(5) 2
18 U.S.C. 922(a)(6) 1, 10, 11, 12, 13
18 U.S.C. 922(b)(3) 12, 13
N.C. Gen. Stat. §§ 14-402 to 14-404 (1986) 13
Fed. R. Crim. P. 41(e) 7, 8, 17

Miscellaneous:

S. Rep. 1501, 90th Cong., 2d Sess. (1968) 11

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A33a) is reported at 803 F.2d 714 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1986, and a petition for rehearing was denied on November 21, 1986 (Pet. App. A41-A41a). The petition for a writ of certiorari was filed on January 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District for the Middle District of North Carolina, petitioner was convicted of making a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6). She was sentenced to five years' probation and a $2,500 fine.

1. The evidence at trial, the sufficiency of which is not in dispute, is set out in the opinion of the court of appeals (Pet. App. A3-A6, A13-A14). It showed that petitioner, an attorney, is a partner in the California law firm of Decious, Reid and Associates and is counsel to the New York City law firm of Daniel P. Foster, P.C. In May 1981, petitioner and her parents visited petitioner's aunt at the latter's home in North Wilkesboro, North Carolina. Petitioner had never lived in North Wilkesboro and, with the exception of this brief family visit, had never visited her aunt there. On May 7, 1981, petitioner purchased a handgun from a federally licensed firearms dealer in Winston-Salem, North Carolina. Federal law prohibits a dealer from selling firearms to a person who is not a resident of the state in which the dealer resides. 18 U.S.C. 922(a)(5). On Form 4473, a Bureau of Alcohol, Tobacco and Firearms form that the purchaser is required by law to fill out (*Huddleston* v. *United States*, 415 U.S. 814, 816 (1974)), petitioner listed as her address the address of her aunt in North Wilkesboro. For identification, petitioner furnished a pistol permit, which is required by North Carolina law for the purchase of a handgun, and an expired international student identification card. Petitioner had acquired the pistol permit two days earlier from the County Sheriff's Department in North Wilkesboro. At that time, petitioner told the Sheriff's Department that she was living with her aunt in North Wilkesboro. She explained her lack of any North Carolina identification on the ground that she had not been in the State long enough to acquire identification. She stated, however, that she was thinking of taking the bar examination and staying in North Carolina.

Shortly after purchasing the handgun, petitioner returned to New York. In June 1981, she applied for admission to the New York bar. On her bar application, petitioner stated that her address was Brooklyn, New York,

and that she had resided there since October 1978. Petitioner did not list the North Wilkesboro address in response to a question asking for a list of every permanent and temporary residence she had had since entering college.

Petitioner testified at trial that in listing the North Wilkesboro address on the ATF form, she considered that address to be a truthful statement of her residence at that time. Although she had only been at the North Wilkesboro address on the one occasion, she stated that she considered it to be her residence because "[I] could go there at any time, I could go live with my aunt at any time, I am welcome there at any time, her home is my home." Pet. App. A13-A14.

2. Petitioner's sales receipt for the purchase of the handgun in North Carolina was discovered during the search of an office of the Foster law firm at Apartment 1A, 1107 Carroll Street, in Brooklyn, New York. That address was one of five locations searched by the FBI, pursuant to warrants, on February 17, 1984.

The warrants were issued on the basis of an affidavit prepared by FBI Agent Neil Herman (App. 6-46).[1] Agent Herman's affidavit recited that the Provisional Party of Communists (PPC) operated out of three buildings located at 1107, 1111, and 1115 Carroll Street in Brooklyn (App. 7, 9-11, 20). The affidavit then set forth detailed information about the premises and the PPC that was obtained from several former members of the PPC, Carroll Street residents, and other sources as a result of an extensive investigation by the Joint Terrorist Task Force (App. 9, 19-20, 22, 25-27, 29, 33, 38).

The affidavit stated that the PPC was a revolutionary communist party founded in 1971 whose goal was the overthrow of the United States government by military

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[1] "App." refers to the Supplemental Appendix filed by the government in the court of appeals.

force (App. 10-11, 22, 25-26, 28-29, 33-34). Numerous "front organizations," mostly unions, were run and controlled from the PPC's national office, which was located in Apartment 2A at 1107 Carroll Street (App. 12-13, 22). Directly below the national office, in Apartment 1A, was the law firm of Daniel Foster, a PPC member (App. 13). The law firm was controlled by the PPC and staffed and run by PPC members (*ibid.*). Apartment 1A also housed the office of Gino Parenti, the leader of the PPC (App. 13-14). All PPC operations were conducted out of the national office and from Foster's law firm (App. 13). One of the front organizations used by the PPC was "Foxfire Enterprises, Inc.," which owned and operated the three buildings at 1107, 1111, and 1115 Carroll Street (App. 12-13). One of the PPC's "safe houses" was a penthouse apartment located at 145 West 55th Street in Manhattan (App. 17).

The affidavit recited that the scheduled date for the PPC's planned coup was February 19, 1984 (App. 10, 20, 25). The coup was to be undertaken by the "military fraction" of the PPC and by means of a general strike on the east and west coasts by unions under PPC control (*ibid.*). The PPC anticipated that it would take three days of fighting to complete the coup (App. 19). The "military fraction" of the PPC conducted military drills, and its members received military training (App. 11-12, 21-22). The affidavit recited that within the preceding 18 months, more than 100 firearms—including submachine guns, assault rifles, and military style M-1 carbines—had been seen in Apartment 2A at 1107 Carroll Street, and that within the preceding five days, hand grenades and numerous other firearms and ammunition had been seen in Parenti's apartment (App. 15, 18-19, 21, 27, 29). A PPC guard kept a 24-hour "lookout" from the PPC's second story window at 1107 Carroll Street, and during "alerts," armed PPC members were frequently seen at the Carroll

Street location (App. 14-15, 28, 41). The affidavit further recited that records and files of the "military fraction" were maintained in Foster's law office at Apartment 1A, 1107 Carroll Street, and that other PPC files were to be found throughout Apartment 2A (App. 13-14).

Finally, the affidavit stated that on February 16, 1984, grand jury subpoenas had been served on Daniel Foster and Kathryn Conelly Decious to produce certain documents (App. 42). Decious and Foster appeared before Judge Eugene Nickerson of the United States District Court for the Eastern District of New York that same day to contest the validity of the subpoenas. They indicated at that time that they did not have the requested records or any knowledge of them (App. 42-43).

On the basis of Agent Herman's affidavit, Judge Henry Bramwell of the United States District Court for the Eastern District of New York issued warrants on the evening of February 16, 1984, authorizing the search of the Carroll Street buildings and the penthouse apartment in Manhattan (App. 1-5A). The search warrant for Apartment 1A at 1107 Carroll Street authorized the officers to search for, inter alia, "records relating to the purchase, storage and disposal of weapons, ammunition and explosives" (App. 2).[2] During the search of Apartment 1A,

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[2] The search warrant for Apartment 1A, 1107 Carroll Street, authorized a search for (App. 2):

1. Weapons (rifles, handguns and machineguns) and other military equipment including uniforms;

2. Explosives;

3. All records of the Provisional Party of Communists (PPC) relating to the purchase, storage, location and disposal of weapons, ammunition and explosives;

4. All books, documents and records outlining the PPC's plans for an armed insurrection against the lawful authority of the United States Government;

agents found the sales receipt for the firearm petitioner had purchased in North Carolina (App. 88, 98, 164-168). All the items seized during the several searches were taken to the FBI office in the Southern District of New York, where they were inventoried and stored under lock and key (App. 75, 107). Thereafter, pursuant to court order, the government made available to Daniel Foster for inspection and copying all the material that had been seized from his Carroll Street law office (App. 267-270).

3. Following the searches, Foster filed motions in the United States District Court for the Eastern District of New York to quash the search warrants and for return of property (App. 258, 290-291). Following a hearing on March 7, 1984 (App. 256-300), the district court denied the motion to quash, ruling that it was moot because the warrants had been executed and returned and noting that a motion to suppress could be filed if criminal charges were brought (App. 258, 283, 286-288).[3]

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5. All records relating to planned terrorist activities;

6. All records of the "Military Fraction" of the PPC including, but not limited to, records detailing planned military activities directed against the lawful authority of the United States Government, records detailing planned terrorist activities, records concerning the location of "Military Fraction" headquarters, records relating to the location of weapons, ammunition and explosives, records relating to the purchase, storage and disposal of weapons, ammunition and explosives, records relating to the identity of those individuals making up the "Military Fraction" of the PPC and records relating to the system of communications among and between the different locations of the "Military Fraction" of the PPC; and

7. The books and records of Foxfire Enterprises, Inc.

[3] During the March 7 hearing before Judge Bramwell, Foster complained that at the time the government sought the search warrants from Judge Bramwell, the question of the validity of grand jury subpoenas issued on February 16 for some of the same material was pending before Judge Nickerson (App. 259-260, 264-265). Judge Bramwell

Thereafter, Foster filed several motions in the United States District Court for the Southern District of New York, including a motion to quash the search warrant executed at 145 West 55th Street and a motion pursuant to Fed. R. Crim. P. 41(e) for suppression and return of the items seized at that address. The district court denied the motions on April 23, 1984 (App. 254-255). With respect to the Rule 41(e) motion, the court ruled that given Foster's right of access to the seized material, he had failed to show that he would be irreparably harmed if the seized material was not returned (App. 255, citing *Standard Drywall, Inc. v. United States*, 668 F.2d 156 (2d Cir.), cert. denied, 456 U.S. 927 (1982)).

In September 1984, Foster filed a further motion in the Southern District of New York for return of the material seized from the Carroll Street buildings and 145 West 55th Street. At the November 16, 1984, hearing on that motion, the government informed the court that it had returned to Foster all of the material seized from the West 55th Street location (App. 238-242). Because that was the only material seized in the Southern District of New York (App. 241-242), the court ruled that Foster had been granted full relief with respect to documents seized in the Southern District (App. 242-243). The court further stated: "[M]y denial of further relief is explicitly conditioned on the proposition that the plaintiff not be deemed to have waived any rights which it would otherwise have

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commented that had he known that the matter was pending before Judge Nickerson, he doubted that he would have signed the search warrants (App. 260, 265). The attorney for the government informed Judge Bramwell that he had spoken to Judge Nickerson on the evening of February 16 and advised him that the government was applying for several search warrants for material that included some of the subject matter of the subpoenas whose validity was to be considered by Judge Nickerson. The attorney for the government further stated that Judge Nickerson had suggested that the government apply to Judge Bramwell for the warrants because Judge Bramwell lived closer to the courthouse (App. 265-266).

under Rule 41 B [*sic*], or any other rights, to move to suppress the use of any such documents or copies of documents unless they are hereafter legally and properly seized for law enforcement purposes" (*ibid.*). In a subsequent written order, the court ruled that insofar as Foster's motion for return of property pertained to material seized in the Eastern District of New York (that is, from the Carroll Street buildings), Rule 41(e) required that the motion be filed in the Eastern District (App. 233-234).

Foster then filed a motion in the Eastern District for return of the Carroll Street property and to quash the search warrants that had been executed in the Eastern District. The district court denied those motions in an order dated June 7, 1985 (App. 229-232). The government represented to the court that it intended voluntarily to return all the property seized in the Eastern District (App. 229, 230). The government also informed the court that criminal charges were pending against petitioner in federal district court in North Carolina and that the government might seek to introduce at that trial certain evidence that had been seized during the Carroll Street search (App. 231). The court declined to exercise its jurisdiction to pass on the Rule 41(e) motion, noting that the Foster firm would suffer no continuing injury because the government intended to return the property (App. 230) and that it would be inappropriate for the court to rule on the admissibility of any of the evidence that might be offered at a future trial in another district (App. 230-231).

4. Following her indictment on the instant charges, petitioner moved to suppress the sales receipt on the grounds that the search warrants were invalid as general warrants; that the warrants were not supported by probable cause; that the seizure of the sales receipt was outside the scope of the warrants; and that the search was conducted in an unlawful manner. At the hearing on these claims (App. 47-200), the district court expressed the view that

unless petitioner met the test set out in *Franks* v. *Delaware*, 438 U.S. 154 (1978), by establishing that the affiant knowingly and intentionally included in the affidavit false statements that were necessary to the finding of probable cause, he had no authority to invalidate a warrant issued by another federal district judge (App. 53). Petitioner argued that she met the *Franks* standard because the source of the information recited in paragraphs 18 and 25 of the search warrant affidavit was material that had been suppressed during earlier state court proceedings (App. 54-55). The district court found that even absent the information recited in those paragraphs, there was an "abundance" of probable cause (App. 57, 60-61).

Petitioner also argued that the search warrants had been improperly issued because, when it sought the warrants from Judge Bramwell, the government did not advise him that a challenge to the validity of grand jury subpoenas seeking the same material was pending before Judge Nickerson (App. 50-51, 54). Petitioner relied (App. 52) on Judge Bramwell's statement that he doubted that he would have issued the warrants had he known of the matter pending before Judge Nickerson. The district court noted that Judge Bramwell's statement merely reflected a hesitancy to involve himself in a case being handled by another judge, and it concluded that whether or not Judge Bramwell would have issued the search warrants had he known that a related matter was pending before Judge Nickerson had no bearing on the validity of the search warrants (App. 61).

Finally, petitioner argued that the sales receipt for petitioner's firearm had been seized from the building located on West 55th Street in the Southern District of New York and that District Judge Lasker on November 16, 1984, had suppressed all the material that had been seized in that district (App. 62-63). The government responded that

Judge Lasker had issued no order suppressing evidence seized in the Southern District of New York, and that in any event the receipt had been seized from 1107 Carroll Street, which was located in the Eastern District of New York (App. 63-64). After a hearing on the latter issue (App. 68-191), the court found that the receipt had been seized at 1107 Carroll Street (App. 194-196). The court then denied petitioner's motion to suppress and to dismiss the indictment, stating: "I don't find anything wrong with the search, seizure, or anything else pertaining to the warrant. The preponderance of the evidence leads me to the conclusion that it was proper in every respect." App. 196.

5. The court of appeals affirmed petitioner's conviction (Pet. App. A1-A33). The court found the evidence "quite sufficient to support a finding of guilt beyond a reasonable doubt on the critical issue of [petitioner's] specific intent given the fleeting contact she had with the North Carolina 'residence' she claimed, and her conflicting statements of residence in other contexts" (*id.* at A33). The court also summarily rejected as "without merit" petitioner's claim that 18 U.S.C. 922(a)(6) was unconstitutional as applied to her (Pet. App. A32). Finally, the court of appeals sustained the district court's refusal to suppress the sales receipt. It found (1) "no error in [the district court's] conclusion that a substantial basis supported the Eastern District of New York Court's finding of probable cause for the issuance of the warrants" (Pet. App. A28), and (2) that petitioner had failed to show that Agent Hansen's affidavit contained knowingly false statements that were necessary to the finding of probable cause (*id.* at A27). In this regard, the court of appeals found substantial evidence to support the district court's finding that the seizure of the receipt occurred in the Eastern District of New York, and it therefore declined to consider the effect of any rulings by the District Court for the Southern District of New York. *Id.* at A23-A25.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court therefore is not warranted.

1. Petitioner first contends (Pet. 8-21) that 18 U.S.C. 922(a)(6) is unconstitutional as applied because her purchase of a firearm represented a purely "local transaction" in which the federal government had no legitimate interest. This claim is without merit.

a. The Gun Control Act of 1968 was passed by Congress in response to concerns over the widespread traffic in firearms and their easy availability to persons whose possession of firearms was contrary to the public interest. The primary purpose of the Act was "to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.' " *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974) (quoting S. Rep. 1501, 90th Cong., 2d Sess. 22 (1968)). Section 922(a)(6) was enacted as a means of documenting firearms transactions. As this Court explained in *Huddleston*, 415 U.S. at 825:

> Information drawn from records kept by dealers was a prime guarantee of the Act's effectiveness in keeping "these lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger to us all to allow." 114 Cong. Rec. 13219 (1968) (remarks of Sen. Tydings). Thus, any false statement with respect to the eligibility of a person to obtain a firearm from a licensed dealer was made subject to a criminal penalty.

Given Congress's power under the Commerce Clause to regulate sales by firearms dealers, Congress plainly has the

power to impose criminal sanctions on a person who makes a false statement of material fact to a firearms dealer. Such regulation of private transactions affecting commerce does not impermissibly interfere with the powers reserved to the states by the Tenth Amendment. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 283-293 (1981).[4]

b. Petitioner contends (Pet. 10-11, 18-21) that the Gun Control Act constitutes an impermissible intrusion into state police power in another respect as well. Her argument is as follows: North Carolina law provides that a county sheriff may issue a pistol permit to residents of the county. The Sheriff of Wilkes County issued her a permit, thus determining that petitioner had sufficient local ties to qualify as a resident of that county. Accordingly, petitioner's federal prosecution for making a false statement concerning her residence in connection with the acquisition of a firearm interfered with the State's right to define "residency." This claim is frivolous.

Section 922(a)(6) makes it a crime for anyone knowingly to make any false statement that is intended or likely to deceive a firearms dealer with respect to any fact material to the lawfulness of the sale of a firearm. Section 922(b)(3)

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[4] Contrary to petitioner's contention (Pet. 16-18), application of the federal Gun Control Act in these circumstances likewise does not violate the Second Amendment. It is settled that the Second Amendment is not an absolute bar to congressional regulation of the use and possession of firearms; it protects use or possession that "has some reasonable relationship to the preservation or efficiency of a well regulated militia." *United States* v. *Miller*, 307 U.S. 174, 178 (1939); see also *Lewis* v. *United States*, 445 U.S. 55, 65 n. 8 (1980). Petitioner can make no such claim here. Moreover, petitioner was not convicted of keeping and bearing arms. She was convicted of making a false statement in connection with her acquisition of a firearm—activity that Congress has proscribed as an incidental part of a comprehensive statutory scheme for curbing the illegal possession and transfer of firearms.

makes it unlawful for a dealer to sell a firearm to any person who he believes or has reasonable cause to believe does not reside in the state in which the dealer's business is located. The jury found that at the time petitioner purchased the firearm in question, she falsely stated that she resided at her aunt's address in North Wilkesboro, North Carolina. Given the prohibition in Section 922(b)(3) against sales to nonresidents, petitioner's false statement was unquestionably material.

Nothing in Section 922(a)(6) conflicts with North Carolina law on the same subject. The applicable state statutes make it unlawful for a dealer to sell a pistol to a person without a permit and authorize the county sheriff to issue a permit to a resident of the county. N.C. Gen. Stat. §§ 14-402 to 14-404 (1986). Thus, North Carolina law, like federal law, requires that a permit for the sort of firearm petitioner purchased be issued only to a resident of the State. That the Wilkes County Sheriff issued petitioner a permit upon her representation that she intended to remain in that county in no way established that petitioner in fact was a resident of North Carolina; if anything, it suggests that the Sheriff erroneously issued petitioner a permit. Indeed, petitioner fails to cite any definition of "resident" under North Carolina law by which she could conceivably qualify as a resident of North Carolina. In any event, Congress has full power to regulate matters affecting commerce in firearms. Under the Supremacy Clause, the laws Congress enacts on that subject—including those at issue in this case that prescribe the definition of residence and establish procedures for ascertaining residence—are controlling, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2.[5]

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[5] Petitioner's reliance (Pet. 15-16) on *United States* v. *Behenna*, 552 F.2d 573 (4th Cir. 1977), is misplaced. First, as the court of appeals noted in the instant case (Pet. App. A20-A21), the defendant in

2. Petitioner's various challenges to the district court's denial of her motion to suppress the sales receipt (see Pet. 22-46) are also without merit.

a. Contrary to petitioner's contention (Pet. 23-24), the record shows that the district court conducted an extensive hearing on petitioner's motion to suppress (App. 47-200), after which it ruled that the warrant and ensuing search were proper in every respect (App. 194-196). Petitioner cites nothing to support her assertion that she was foreclosed from introducing evidence bearing on her motion to suppress. To be sure, the district court expressed the erroneous view that under *Franks* v. *Delaware*, it had no authority, in the absence of a showing that the affidavit contained knowing misrepresentations necessary to the finding of probable cause, to invalidate a warrant issued by another federal district judge (App. 53). However, petitioner did not take issue with the court's statement to that effect. Instead, she maintained that she could make a showing that satisfied the *Franks* v. *Delaware* standard that the district court invoked (App. 53-62).[6]

In any event, the district court's misapprehension was of no moment, because the court carefully scrutinized the warrant and the ensuing search and found them to be proper in every respect. The record fully supports the district court's conclusion in that regard. The detailed 40-page affidavit of FBI Agent Herman indisputably pro-

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Behenna objected to the jury instructions regarding his intent with respect to residence; petitioner did not do so. Second, as the court below further noted (Pet. App. A21-A22), the decision in *Behenna* was "highly fact-specific" and "focused upon ambiguity of particular instructions in relation to particular evidence" regarding the defendant's future residence. In any event, the distinctions drawn by the court below between this case and its prior decision in *Behenna* present no issue warranting review by this Court.

[6] Petitioner likewise did not urge reversal on this particular ground in the court of appeals (see Appellant's Br. 10-20), and she mentions the point only in passing here (see Pet. 30).

vided the requisite probable cause for issuance of a warrant, even without the two paragraphs that petitioner challenged as false. Indeed, petitioner does not contend otherwise. As the district court observed at the suppression hearing, any judicial officer who did not issue a warrant when presented such an affidavit "would be derelict in [his] duty" (App. 61). Moreover, because the executing officers were, at the very least, entirely justified in relying on the warrant issued by a federal district judge, petitioner would not be entitled to suppression of the sales receipt even if the courts below had concluded that the affidavit did not provide sufficient probable cause to support the warrant. See *United States* v. *Leon*, 468 U.S. 897 (1984).

b. Nor is there any merit to petitioner's argument (Pet. 37-43) that the warrant was unconstitutionally overbroad because it provided no guidance to the agents as to what was to be seized and because the agents had to examine the contents of every document in order to determine whether it was within the scope of the warrant. The warrant made perfectly clear what items were subject to search and seizure. It authorized the search for guns and ammunition; records pertaining to the purchase, storage, location, and disposal of those weapons; records concerning PPC's terrorist activities and its plans for an armed insurrection against the United States; and the records of Foxfire Enterprises. The fact that the searching agents had to examine numerous documents at 1107 Carroll Street in order to determine which documents fell within the scope of the warrant does not establish that the warrant was overbroad. In document searches of the nature involved here, a cursory examination of innocuous documents is inevitable and entirely proper. *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976).

c. Petitioner's related claim (Pet. 41) that the sales receipt was outside the scope of the warrant because it "was not listed individually or categorically as an item to

be seized" is wholly insubstantial. The warrant authorized the search for "records relating to the purchase, storage and disposal of weapons" (App. 2). The fact that petitioner's name was not specifically mentioned in the warrant is irrelevant.[7]

d. Finally, there is no merit to petitioner's contention (Pet. 33-35) that the district court should have suppressed the receipt and dismissed the indictment on the basis of the November 16, 1984, order by Judge Lasker in the Southern District of New York. Petitioner characterizes that order—which is quoted in relevant part in the court of appeals' opinion (Pet. App. A10)—as one suppressing all items seized in the Southern District. That characterization is simply erroneous. In context, it is clear that Judge Lasker was not ruling on the legality of the search or suppressing any evidence seized in his district. Indeed, Judge Lasker never considered any evidence concerning the

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[7] Petitioner's suggestion (Pet. 24-29) that the government acted improperly or that the warrant was invalid because the grand jury one day earlier had issued subpoenas for some of the same material also is insubstantial. Contrary to petitioner's intimation (Pet. 25-26), the pendency before Judge Nickerson of a challenge to the subpoenas was not hidden from Judge Bramwell, who issued the search warrant. That fact was recited in Agent Hansen's affidavit that was submitted to Judge Bramwell in support of the warrant application (App. 42-43). Furthermore, Judge Bramwell's comment that he might not have issued the search warrant if he had known that the matter was pending before Judge Nickerson merely reflected a reluctance to interfere; it did not imply that the search warrant should not have been issued or that the government had acted improperly (App. 61, 265-266). Finally, as explained in the affidavit (App. 42-43) and by the government during the March 7, 1984, hearing before Judge Bramwell (App. 260), there were grounds to believe that Foster and Decious had made misrepresentations to Judge Nickerson when they stated in contesting the subpoenas that they did not have any of the records in question. Because there was probable cause to believe that the PPC planned violent activity on February 19, 1984 (App. 10, 20, 25), circumstances plainly justified the government's seeking a search warrant to be executed on February 17, 1984.

search. And in the November 16 order, he in fact denied Foster's Rule 41(e) motion for return of the property that had been seized from 145 West 55th Street because the government had returned that property to Foster (App. 233-234, 238-243). In so doing, Judge Lasker merely noted that his order did not foreclose Foster (or, presumably, petitioner) from later challenging the legality of the search in any subsequent criminal proceeding. Petitioner was afforded an opportunity to do precisely that in her prosecution below.

Furthermore, as the district court found, the sales receipt was not seized in the Southern District of New York, but from 1107 Carroll Street in the Eastern District of New York (App. 194-196). The court of appeals held that the district court's finding on this point was supported by substantial evidence, which it recited in considerable detail (Pet. App. A23-A25). That concurrent factual determination by the courts below is not clearly erroneous and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40285